IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 103 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH
and
Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GANGA TABHA

Versus

STATE OF GUJARAT

Appearance:
MR MB PARIKH for Petitioner
MR KC SHAH APP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH
and
MISS JUSTICE R.M.DOSHIT

Date of decision: 16/03/2000

ORAL JUDGEMENT (PER : PARIKH J)

This conviction appeal arises from the impugned

judgment and order dated 1st February, 1990, rendered by the learned Additional Sessions Judge, Amreli, in Sessions Case No. 37/88. The appellant, who has been referred to as the accused herein, came to be convicted for the offence punishable under section 302 of the Indian Penal Code (IPC for short), and sentenced to life imprisonment for the said offence.

The facts of the prosecution case, briefly stated are -

At about 9-30 AM on 4th March, 1988, the accused persons Harijan Hama Mulabhai, Harijan Haja Tabha, Harijan Balu Mula, Harijan Ganga Tabha (present accused) and Harijan Samant Tabha formed unlawful assembly with common object to commit murder of Mala Bhimabhai, and in prosecution of the aforesaid common object, used violence and committed offence punishable under section 147 of the IPC. Besides, in furtherance of the aforesaid common object, they were also armed with deadly weapons like iron pipe, an axe etc. and thereby they committed offence punishable under section 148 of the IPC. It was also alleged that the accused no.1 - Harijan Hama Mula; accused no. 4 - Harijan Ganga Tabha (present accused); and accused no. 3 - Harijan Balu Mala respectively dealt blows respectively with stick, axe and iron pipe on Malabhai, and in prosecution of the common object as aforesaid, the remaining accused persons also dealt stick blows on Malabhai, who ultimately died on account of the injuries sustained by him. On these charges attributed to the accused persons, they were tried before the learned Additional Sessions Judge, and they pleaded not guilty to the the charge. At the conclusion of the trial, they contended that the prosecution evidence against them was false and they were falsely implicated. According to the accused nos. 1, 2 , 3 and 5 (other than the present accused), they were not present at the time of the incident and they were falsely implicated in the incident. The present accused admitted that he was having with him the muddamal axe at the time of the incident. According to his case, as contained in his written statement Ex. 36, when he stopped to take Pan at the pan-cabin of Rambhai on his way to his field (Wadi) for cutting sugarcane, the deceased Malabhai started abusing him with filthy language. The accused asked the deceased why he was abusing him particularly when he had guests at home. The deceased further got excited and started giving him fist blows and kick blows, and also caught hold of him and started snatching away the axe which the accused had with him. Apprehending that by snatching the axe from him, the deceased might kill him,

the accused attempted to give the axe blow on the hand of the deceased Malabhai in order to save his own life. At that time, the deceased Malabhai bent down and axe blow landed on his head. Infact, he did not have any intention to kill Malabhai. According to his defence, Rambhai- pan cabin holder was present in his cabin.

After hearing the submissions made on behalf of the rival parties, the learned Additional Sessions Judge came to the conclusion that the prosecution failed to establish guilt of all other persons beyond reasonable doubt, therefore, acquitted them.However, accepting the prosecution evidence as related to the present accused, he held that the present accused gave the axe blow on the head of the deceased Malabhai. Dealing with the submission as to what was the nature of the offence proved to have been committed by the present accused, the learned Additional Sessions Judge has held that on account of the fact that the accused had a motive and also had an axe with him, and on account of that, he had selected the vital part like head for inflicting axe blow on deceased Malabhai, it could not be said that the injury was caused on the spur of a moment in the heat of passion. He has also come to the conclusion that the case could not be said to have been governed by section 304 of the IPC. Reference was made to the decisions in RANDHIR SINGH VS STATE OF PUBJAB (AIR 1982, SC, 55); KULWANT RAI VS STATE OF PUNJAB (AIR 1982, SC, 126); THOLAN VS STATE OF TAMIL NADU (AIR 1984, SC, 759) and JAGTAR SINGH VS STATE OF PUNJAB (1983, SCC (CRIM) 459.According to the opinion of the learned Additional Sessions Judge, the case was not covered by the circumstances of the respective cases before the Apex court. In those cases before the Apex Court, the accused persons were held to have given fatal blow on spur of moment, in the heat of passion and upon the sudden quarrel, whereas in the present case, it was not to be so upon appreciation of evidence led before the learned Additional Sessions Judge. Thus, although the accused gave only single blow on the head of the deceased, the learned Additional Sessions Judge has inferred that had the deceased not bent down, the accused would perhaps had given another blow and merely because PW-2 Govindbhai stated at one stage that there was altercation and 'Maramari' (exchange of hand), it could not be said that the incident in question took place on the spur of moment and in the heat of passion. He, therefore, convicted and sentenced the accused as aforesaid. That is why the accused is before this court in this appeal.

We have heard the learned advocate appearing for

the accused-appellant and the learned APP for the State. The facts of the prosecution case run into a narrow compass. Even the submissions made on behalf of the rival parties before us also run into a narrow compass. It is on the record that rest of the accused persons stood acquitted at the end of the trial, and from that, it has been submitted that the basic facts involving those accused persons coupled with the present accused person could not be said to have been established beyond reasonable doubt in so far as the present accused is concerned. Reference has been made in this case to the decision of the Supreme Court in the matter of LAKSHMI SINGH VS STATE OF BIHAR (AIR 1976, SC, 2263), saying that "Where all the witnesses enter into a conspiracy to implicate five innocent persons in a murder case, then the backbone of the prosecution is broken and it would be difficult for the court to rely on such evidence to convict a single accused particularly when the prosecution does not give any explanation for the grievous and other serious injuries. It is a case where it is not possible to disengage the truth from falsehood to sift the grain from the chaff. The truth and falsehood are so inextricably mixed together that it is difficult to separate them. Indeed if one tries to do so, it will amount to reconstructing a new case for the prosecution which can not be done in a criminal case ". However, in the present case, it is an admitted fact that the accused no.4 viz. the present accused was admittedly involved in the incident. It is only the manner of occurrence of the incident that is at variance between the parties. It must be noticed from the defence that there was an occasion of engagement of the daughter of the accused on the fateful day when it was alleged by the defence that the deceased, in a drunken condition, started hurling filthy abuses at the door-step of the accused where the Pan-cabin of Rambhai was located. On being requested not to do so on account of the fact that there were guests at the residence of the accused, the deceased started giving fist blows and kick blows and even started snatching away the axe which the accused had in his hand as he was then to proceed to his field for [cutting sugarcane. Apprehending that the deceased might snatch away the axe and kill him with his own axe, the accused gave axe blow on the hand of the deceased, but co-incidentally the deceased had bent down resulting into lending of the axe blow on his head. It is this story which we are required to examine upon appreciation of evidence placed on record of the present case. However, it is a fact that the accused was involved in the incident in question and therefore there is no scope for applying the aforesaid decision so as to render

acquittal. He has not adduced any defence evidence with regard to self-defence. It is true that Rambhai, Pan cabin holder, was cited as one of the prosecution witnesses. It is also true that he was not examined by the prosecution saying that he was likely to be hostile to the prosecution case. However, that is not the reason why he could not be examined by the defence in support of the private defence set up by the accused. Therefore, what remains is the prosecution evidence which has to be appreciated. There are two aspects from the prosecution evidence which the learned Additional Sessions Judge has highlighted for convicting and sentencing the accused under section 302 of the IPC. Firstly, the motive on the part of the accused, and the second is insufficiency of material about heated exchange on the spur of moment or in the heat of passion and altercation at the time of the incident. We will deal with these two aspects of the prosecution case from the evidence itself.

PW - Malaiben daughter of Chinabhai, PW-1, Ex-13 happened to be niece-in-law of deceased Malabhai. It was about 9-30 AM when she was proceeding towards her new house in the company of her son Manu. The deceased Malabhai was coming from the eastern direction. When he reached near the Pan shop of Rambhai, the accused Hama Mula, Balu Mala and Haja Tabha came out from the house of Balu Mala, and the accused Samant Tabha, and Gaga Tabha came out from the house of Ganga Tabha. They were armed with the weapons as aforesaid. They started abusing deceased Malabhai and assaulted to kill him. In the process, Balu Mala gave iron pipe blow on the back side of the deceased Malabhai, and the present accused gave axe blow on his head. The deceased Malabhai fell down, so the accused persons ran away reiterating the words 'kill, kill'. She has then deposed how deceased Malabhai was taken to the Hospital and how he was treated while also operated. She also testified that during evening time on the same day, the dead-body of Malabhai reached his residence. There has been a detailed cross-examination of this witness and the learned Additional Sessions Judge has dealt with the same while acquitting the rest of the accused persons. In so far as the present appeal is concerned, it would be important to notice that the witness has admitted that the deceased Malabhai was addict to liquor and that on the fateful day, there were guests to see the daughter of Gaga Tabha. She however denied the suggestions regarding the alleged defence of the deceased having drunk liquor and abusing the accused and giving him the blows. It would appear from the evidence of this witness that there have been omissions with regard to the facts which can be

attributed to the other accused persons in so far as her earlier statement was concerned. That is how the prosecution story did not find support with regard to the involvement of the other accused persons in the offences attributed to them under sections 147, 148 and 149 of the IPC. We have, however, to bear in mind the fact that the deceased was addict to liquor and that there were guests at the residence of the accused on account of probable engagement of daughter of the accused. These very facts emerging from the vital prosecution evidence like the oral testimony of Malaiben can hardly be overlooked when the evidence is to be appreciated.

Then there is evidence of Lakhmanbhai Sidibhai, PW-2 Ex-14. In the evidence of this witness, the omissions with regard to implication of rest of the accused persons have been brought to notice in the cross examination on behalf of accused no. 5. It has in terms emerged in the evidence of this witness that there was exchange of words between the deceased Malabhai and the present accused and there was a quarrel resulting therefrom entering the stage of exchange of hands. These facts emerging from the evidence of this witness can also not be over-looked while appreciating the evidence of prosecution.

Then there is evidence of Manubhai Masribhai, PW-3, EX-15, in which omissions with regard to the implication of the rest of the accused persons have also been brought to notice. This witness has admitted that all the five accused persons had their agricultural fields for canvassing the submission that ordinarily sticks, iron pipe and the axe like the muddamal axe were the weapons which were handy in natural course of occupation which the accused persons were undertaking.

PW-4 Nathubhai Bhikhabha, EX-16 happens to be the the brother of deceased Malabhai. This is again with regard to the alleged motive which has been considered by the learned Additional Sessions Judge that arises from the fact that there was an occasion of marriage of the daughter of this witness and therefore he had gone to pursuade deceased Malabhai for attending that occasion (possibly because of some previous difference/dispute between the two brothers). The accused Ganga reached there (possibly to take the side of this witness) and told deceased Malabhai that he should attend the occasion of marriage. At that time, deceased Malabhai asked the accused not to interfere in the matter between the two brothers. To that, the accused reacted saying that he

would see Mala by the time Hutasani festival would ensue. The witness testified that this was the reason why the accused killed his brother Malabhai. In his cross-examination, however, the witness admitted that he did not feel or think that simply because the accused uttered the words that he would see Mala by the time Hutasani festival would ensue he would in fact kill Mala. He has then admitted that Malabhai did not lodge any complaint with regard to such a threat; that there was no incident/s of exchange of words or quarrel between the accused and the deceased; that Malabhai infact attended the occasion of marriage at his place and that there was reconciliation between the members of the two families. We are at pains to observe that such a trifling utterance of words at the incident stated to have been occurred when the witness Nathubhai went to pursuade his brother deceased Malabhai for attending the occasion of marriage of his daughter, could ever have been stretched to such an extent as to form such a ghastly motive on the part of the accused to kill Malabhai. Undoubtedly, nothing occurred till the date of incident. Infact, the matter could have been resolved if the deceased had attended the occasion of marriage of daughter of the witness Nathubhai-his brother. Therefore, there was no question of the accused harbouring any ill-feeling or ill-will against the deceased Malabhai. It will be too much to hold that the accused had motive to kill the deceased at the time of the incident in question. Even the evidence of witness Nathu who appears to have been relied upon by the learned Additional Sessions Judge does not indicate such a motive. As a matter of fact, it is not that the accused had gone to the house of the deceased in furtherance of such motive. Pan cabin apparently was located in the vicinity or nearby the house of the accused; admittedly the accused had some good occasion and had guests on such occasion. Such a factual situation in respect of the incident in question would normally rule out the alleged motive on the part of the accused to kill the deceased. Therefore, the finding of the learned Additional Sessions Judge on the question of motive clearly appears to be uncalled for even from the prosecution evidence as aforesaid. It is here that non-examination of the witness Rambhai Vashrambhai, pan cabin holder, assumes importance. Had he been examined by the prosecution, probably, further facts with regard to how the incident occurred might have come to light. Mr. K.C.Shah, the learned APP however submitted that the accused has not adduced any evidence to prove his self-defence. Stretching his argument further, he submitted that it can not therefore be held that he had exceeded his self-defence. Still further stretching his

argument, he submitted that the alleged offence could not be said to be attributable under section 300 IPC. He, therefore, submitted that the finding of the learned Additional Sessions Judge that the case did not fall under section 304 of the IPC would merit acceptance even at the hands of this court. We are unable to accept the last submission of the learned APP. The medical evidence in the form of certificate Ex.21, oral testimony of Dr.Bhimjibhai Karshanbhai Fulbariya PW-7, Ex-23, oral testimony of Dr. Satish Dinkar Kalela, PW-8, EX-23, and Post-mortem report Ex. 25 clearly indicate that this is clearly a case of one blow and there was no other injury which could be noticed on the body of Malabhai. On one hand, the involvement of rest of the accused has not been established beyond reasonable doubt as held by the learned Additional Sessions Judge, on the other hand, it is a fact that the defence also has not been able to establish that the accused acted in self-defence at the time of the incident. Nonetheless, the defence that there were guests at the residence of the accused, that the deceased was drunk at the time of the incident, that there was a quarrel between the two at the time of the incident and some altercation as aforesaid, clearly surface on the face of the prosecution evidence. Therefore, the finding that the case shall not fall under any of the exceptions of section 300 of the IPC and therefore under section 304 of the IPC can not be sustained. There shall be no answer to the proposition that the case would fall under the exceptions to section 300 read with section 304 part-II of the IPC. On behalf of the accused, reference has been made to a decision in the matter of Tholan (supra). In that case, the accused started remonstrations using filthy language against certain organisers of a chit fund who had no connection with the deceased in front of the house of the deceased and the deceased came out of his house and asked the accused to go away, the accused on spur of moment gave only one blow with knife to the deceased and pushed him to some distance. In the background of such facts, it was held that though requisite intention to commit murder could not be attributed to the accused, he wielded a weapon like a knife and therefore he could be attributed with knowledge that he was likely to cause an injury which was likely to ' cause death '. In such a situation though he could not be convicted under section 302, he would be guilty of committing an offence under section 304 part-II.

So far as the facts of the present case are concerned, it would also be appropriate to say that the accused wielded the weapon like the axe on the vital part

of the body of the deceased under the circumstances noted hereinabove, and therefore he can be attributed with the knowledge that he might have caused such injury as would cause death in ordinary course of nature. There can be no escape from the ultimate conclusion that the offence would fall under section 304 Part-II of the IPC. As a matter of fact, the weapon was handy in the sense that the accused being a farmer could ordinarily with him the weapon like axe which was with him at the relevant point of time. In this view of the matter, the finding of the learned Additional Sessions Judge that the offence would fall under section 300 of the IPC and not under section 304 of the IPC deserves to be altered.

This appeal is, therefore, partly allowed. The conviction of the accused is altered from that under section 302 of the IPC to under section 304 Part-II thereof.

In respect of sentence, it can hardly be disputed that the accused has been in jail since the time he was apprehended during the course of proceeding before the trial court (5th March, 1988). It will, therefore, clearly appear that he has already undergone nearly 12 years of imprisonment. Hence, the sentence will deserve to be altered from life imprisonment to the sentence undergone.

Order accordingly. The accused shall be set at liberty forthwith, if not required for any other case.

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JOSHI